No. 97100280

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARTHA J. WILLIAMSON, and Wiley Williamson,

Petitioners,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY, a Torchmark Company, and Glyn Mott, Individually and as District Manager,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Appellees, Liberty National Life Insurance Company ("Liberty National") and Glyn Mott ("Mott") do not accept the Petitioner's statement of the Questions Presented for Review. Instead, the questions presented are as follows:

1. Whether a facially untimely Charge of Discrimination is sufficient to support a subsequent action for hostile work environment sexual harassment when the alleged acts have never been the subject of a charge to the EEOC or included in any complaint filed with the district court?

2. Whether a claim for hostile work environment sexual harassment can be maintained by a former employee for acts allegedly committed by a former supervisor after the date of the employee's termination?

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STATEMENT OF THE CASE

Liberty National and Mott cannot accept the entirety of the statement of the case as presented by Petitioner. Especially, the inclusion of endless detail concerning the period of time prior to her termination. The following is submitted as a more accurate statement of the case in light of the fact that the issues on appeal concern only the untimeliness of Petitioner's charge and alleged acts of hostile work environment sexual harassment occurring subsequent to her termination.

Petitioner was terminated on April 13, 1994, allegedly for refusing to engage in sexual relations with Mott, the District Manager for the Meridian, Mississippi District. (R. 44, 381, 525, 753,-725).[1] No earlier than October 12, 1994, Petitioner filed her charge of discrimination with the EEOC alleging harassment beginning soon after her employment on March 2, 1992, and stating that "[t]he last incident was when he asked me if 'I had come to a decision about whether or not I would have sex with him.' I told him no and he then responded by firing me, effective April 15, 1994." (R. 515). Although the firing was allegedly effective April 15, 1994, Petitioner testified that this "last" incident of harassment occurred on April 13, 1994. (R. 381, 753, 756, 761). The charge did not indicate any "continuing action". (R. 515). Although never included in her charge, or in

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[1]Liberty National and Mott dispute the truthfulness of Petitioner's allegations concerning sexual harassment and the reasons for her termination. However, for purposes of argument and in light of the procedural posture of this case on appeal, Liberty National and Mott will assume her allegations to be true.

her Complaint, Petitioner testified that on June 6, 1994, she received a letter concerning passage of a Life Underwriters' Training Course ("LUTC"). She had taken the exam while still employed. (R. 459, 472). After receiving this letter she contacted the Meridian District office and spoke with Mott concerning the test. He asked her to bring her letter into the office. (R. 472). When she arrived a day or two later, Mott informed her, according to her testimony, that the home office refused to reimburse her because she "had been fired and/or was no longer an employee." (R. 472).

On June 23, 1994, prior to learning of Petitioner's allegations of sexual harassment, Newell Cheesborough, Regional Vice President with Liberty National, relieved Mott from his duties as District Manager of the Meridian District office for lack of performance and placed him on administrative leave. (R. 765-768, 771, 778-784, 786). Cheesborough offered Mott the opportunity to remain in the Meridian office as a sales agent or sales manager and told Mott to take a vacation to consider his future. Mott never returned to work for Liberty National in any capacity. (R. 766-767, 780). These events transpired before Cheesborough had knowledge of Petitioner's allegations. (R. 771, 778). When Mott returned from vacation, Cheesborough told him of Petitioner's allegations, told him that under no circumstances would he be working in the Meridian District office, and gave him the option, depending upon the investigation, of taking early retirement or being transferred to another office. (R. 782). Cheesborough also told Mott that he would never hold a managerial position with Liberty National. (R. 782). Mott chose to take his retirement from Liberty National on approximately July 11, 1994. (R. 779-782, 786). After his retirement, Mott had no authority whatsoever to perform any function on behalf of Liberty National. (R. 786). On learning of Petitioner's allegations, Cheesborough offered to

reinstate her with back pay plus additional consideration for her execution of a confidential settlement agreement. (R. 474-475). Petitioner declined the offer and on July 12, 1994, Liberty National offered her unconditional reinstatement with full back pay, benefits and other expenses. (R. 476). Although Petitioner alleges that she did not know of any remedial action by Liberty National until after discovery, upon her return to work on July 18, 1994, Petitioner knew that Mott was no longer working for Liberty National and no longer had authority to act with regard to her employment because she refused to return unless Mott was not there. (R. 476, 477, 760, 762, 779, 786).

Although Petitioner has attempted to create fact out of fiction, it is undisputed that any alleged harassment Petitioner incurred at the hands of Mott, after April 13, 1994, happened at a time when either she was not employed with Liberty National or Mott was not employed with Liberty National. (R. 476, 477, 756, 757). These facts alone necessitate denial of the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari addresses the issues relevant to the Writ in reverse order. Cleverly, Petitioner has attempted to diminish the effect of filing an untimely charge by trying to shift the Court's focus to an "issue of paramount importance to working americans", i.e., whether §703(a) of Title VII of the Civil Rights Act of 1964 applies to former employees. However, in order to reach this issue, it must first be determined that there is no need to file a timely charge with the EEOC.

1. Even if the issues raised by Petitioner were

worthy of this Court's review, her failure to file a timely charge renders those issues moot.

Beginning on page 22 of the Petition, Petitioner argues that the facts concerning the alleged post-employment acts of harassment should relate back to the originally filed charge. This demonstrates Petitioner's continued failure to recognize the significance of filing a timely charge under the EEOC's relation back regulation at 29 C.F.R. §1601.11(b). Her position has been that her facially untimely charge was rendered timely by acts allegedly committed (but not reported to EEOC) during the 180 day period prior to the filing.

This claim is advanced despite the fact that Petitioner never reported these events to the EEOC through an amended charge, raised them in any complaint filed with the district court, or disclosed them during the course of discovery. (A. 8-9). These allegations were raised only in response to Liberty National's and Mott's Motion to Dismiss or, Alternatively, Motion for Summary Judgment. In support of her argument that there is no need to file a charge that is timely with respect to the events alleged in the charge, Petitioner relies on two cases. First, she relies on *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), for the proposition that the alleged post-employment occurrences took place within the 180-day time limit and would have been within the scope of an EEOC investigation thus rendering her untimely charge timely. No more than a cursory reading of *Sanchez* is necessary to conclude that the Fifth Circuit's reasoning therein is not dispositive.

Sanchez involved a situation where the claimant, representing herself, filed a charge of discrimination and checked only the box indicating sex discrimination. The charge

was timely filed with respect to the incidents alleged in the factual statement. After the statutory period had run, the claimant amended her charge to allege national origin discrimination and include a more detailed factual statement of the harassment alleged in the initial charge. Relying on the EEOC's relation-back regulation, 29 C.F.R. § 1601.11(b), the Fifth Circuit found that the failure to check the national origin box was a technical defect or omission because it represented merely the attachment of a legal conclusion to the much more crucial factual statement contained in the charge. *Id.* at 462. For this reason, the amended charge related back to the initial charge date and was thus timely. *Id.* at 463-65. The Court further rejected the defendants' argument that the complaint filed by the plaintiff included matters beyond the scope of either charge filed with the EEOC. In so holding, the Fifth Circuit found that the allegations in the complaint should only be limited by the scope of the EEOC investigation which could reasonably be expected to result from the charge. *Id.* at 466. This rationale, like the relation-back rule, is founded on the fundamental principal that normally EEOC charges are completed by those unskilled in legal procedure and legal causes of action. *Id.*

The facts in *Sanchez* and in this case are so dissimilar that the case has no persuasive value in the case at bar. First, and foremost, is the fact that the claimant in *Sanchez* filed a timely charge with respect to the allegations contained in the charge. Secondly, the claimant filed an amended charge. Finally, the charge in *Sanchez* was completed by a layperson. In the case at bar, Petitioner was represented by an attorney long before the charge was filed. The statement of facts in the charge and the accompanying affidavit give no indication whatsoever that Petitioner had any claim for conduct of Liberty National or Mott occurring after her termination. The factual statement

composed by Petitioner and her attorney affirmatively stated that the "last" act of discrimination occurred when she was fired. (R. 515). In addition, the box provided on the EEOC's form which is intended to give the EEOC and respondent notice of a claim for continuing violations was not checked. (R. 515). These portions of Petitioner's charge rendered it untimely on its face. Finally, the post-employment claims now relied upon by Petitioner have never been included in any complaint filed with the district court. Accordingly, the facts in this case and in *Sanchez* are so different that the Fifth Circuit's holding in *Sanchez* has no real precedential value. The relation back rules relied upon by the *Sanchez* court do not apply because there is no timely charge to which the otherwise untimely and unreported claims can be anchored. Additionally, the court's holding that a claimant's complaint should only be limited by the reasonable scope of the EEOC's investigation triggered by a timely charge is not applicable. In this case, Petitioner's untimely charge would not have triggered an investigation.

Likewise, the second case on which Petitioner relies, the District of Columbia Circuit's holding in *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711 (D.C. Cir. 1978), is not applicable. In *Shehadeh*, the complainant filed numerous charges alleging discriminatory discharge, discriminatory failure to rehire, as well as continued discrimination with regard to employment references. The complainant was discharged in 1968, was refused rehiring in 1971, and filed the first of her five charges in 1973. *Id.* at 718. The district court dismissed her lawsuit. While not disclosed in Petitioner's brief, the circuit court affirmed the district court's dismissal of claims regarding discriminatory termination and refusal to rehire by holding that those claims had "become legally stale and thus unchallengeable" because they had not been filed within the statutory filing period under §706 of Title

VII. *Id.* With respect to her claims of continuing discrimination in distributing negative job references, the court found that though the charge cited but one instance of interference with third-party employment, "it made plain that the specified event was illustrative of a long-lasting pattern of like events." *Id.* at 725. However, the court made clear that "[a]s a general rule, a Title VII claim may be premised only upon specific instances of misconduct of which the Commission is apprised within the statutorily prescribed time." *Id.* at 724. Here, the charge made reference only to Mott's alleged harassment of Petitioner prior to termination and her termination. Nowhere does "it make plain that the specified event was illustrative of a long-lasting pattern of like events" continuing after termination. In fact, Petitioner affirmatively stated that there was a "last" act of discrimination occurring more than 180 days prior to the filing of her charge. Accordingly, the charge was not timely filed with respect to the acts alleged in the charge and failed to invoke the jurisdiction of the EEOC.

Even if Petitioner's argument that an unreported act of harassment can save a facially untimely charge, the act relied on by Petitioner is not actionable. The alleged incident upon which Petitioner attempts to hang her argument is the denial of reimbursement for the LUTC exam fee. According to her own testimony, she was told by Mott that the home office refused to reimburse her because she was no longer an employee of the company. (R. 472). Never has she alleged or attempted to develop during discovery (which has been completed) that she was treated any differently than former employees who were discharged for non-discriminatory reasons.

In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S. Ct. 1885 (1977), this Court dealt with a similar argument as the one advanced by Petitioner. The plaintiff in *United Air Lines,*

Inc. was terminated in 1968 because of her marital status. 97 S. Ct. at 1887. She was rehired in 1972, after the policy resulting in her termination was held to be a violation of Title VII. *Id.* Upon being rehired, the plaintiff was denied seniority status based on her original hire date in 1966; she filed a charge of discrimination alleging sex discrimination. Her subsequent complaint was dismissed for failure to timely file her charge within 90 days of her 1968 termination. *Id.* The plaintiff argued that the seniority system gave present effect to the past discrimination and perpetuated the consequences of illegal action. This Court upheld the dismissal of her complaint and held that because she had failed to file a timely charge with respect to her termination, United was entitled to treat that past act as "lawful or the legal equivalent of a discriminatory act committed before the statute was passed." *Id.* at 1889. This Court found that although the continuation of her seniority status had a continuing effect on her income and benefits, the plaintiff had failed to show the existence of a present "violation". *Id.* Likewise, Petitioner has failed to allege facts that would render the refusal of reimbursement a violation of Title VII. The mere refusal to reimburse a former employee is not a violation of Title VII absent a showing or even an allegation that other former employees are or have been reimbursed for similar expenses.

Additionally, as the Supreme Court has held the focus is properly placed on the "time of the discriminatory acts, not upon the time of which the consequences of the acts became most painful." *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 504 (1980). The refusal to reimburse the LUTC exam fee is a consequence of the allegedly discriminatory termination and not a discriminatory act in and of itself. Accordingly, Petitioner's reliance on the post-employment refusal to reimburse her LUTC expenses is not in and of itself

actionable and does not save her untimely filing. Petitioner's writ should be denied.

2. Petitioner's interpretation and application of the opinions of other circuit courts ignores the factual distinctions among the cases and leads to the erroneous conclusion that the Fifth Circuit's holding in this case creates a split in authority among the circuits.

Petitioner cites several cases from other circuit courts ostensibly in support of her contention that the Fifth Circuit's *per curiam* opinion creates a split among the circuits which warrants review by this Court. Petitioner, however, fails to discern the factual differences and different legal theories upon which those cases are decided.

Before reaching the issue of whether §703(a) applies to former employees, it should be noted that this portion of the district court's opinion which was adopted by the Fifth Circuit was merely additional authority for the dismissal of Petitioner's Complaint. As cited in Petitioner's brief at page 9, the primary reason for the district court's dismissal was Petitioner's failure to timely file her charge. With this said, Liberty National and Mott contend that the Fifth Circuit's unpublished *per curiam* opinion has created no split of authority among the circuits.

All of the cases relied on by Petitioner involve situations where an employer or former employer exercised some control over the employability of the plaintiff. As discussed earlier, *Shehadeh* involved affirmative acts on the part of the plaintiff's former employer to inhibit her ability to gain employment. No such conduct has been alleged in this case. Petitioner argues that there is no analytical difference between the unfavorable employment recommendations in *Shehadeh* and the physical and

emotional effects on Petitioner resulting from alleged past harassment. Although in a different context, this is the precise distinction made by this Court in *United Air Lines, Inc. v. Evans* and *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980). In both of these cases, the effects of past discriminatory acts were distinguished from acts that are discriminatory in and of themselves.

As additional support for her contentions, Petitioner relies on *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). *Sibley* involved a private duty nurse who brought a Title VII sex discrimination claim against the hospital for failing to recommend him for jobs where the patients were female and for actively blocking him for recommendation to female patients on at least two occasions. The district court granted summary judgment on the basis that the nurse was not an employee of the hospital but was employed by the patients to whom the hospital referred him. In reversing the district court, the circuit court considered Title VII's applicability to labor unions and employment agencies both of which have "a highly visible nexus with the creation and continuance of direct employment relationships between third parties." *Id.* at 1342. The court compared the hospital's situation to that of labor unions and employment agencies and found that the hospital controlled "the premises upon which [the nurse's services] were to be rendered, including [the nurse's] access to the patient for purposes of the initiation of such employment." *Id.* On this basis, the court found that the hospital fell within the ambit of Title VII. Similarly, the Seventh Circuit and Eleventh Circuit cases relied upon by Petitioner involve hospitals exercising control over the plaintiffs' access to the job market notwithstanding the fact that there was no direct employment relationship. *See Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291 (11th Cir. 1988), and *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986),

overruled in part, Alexander v. Rush North Shore Medical Ctr., 101 F.3d 487 (7th Cir. 1996)[2]. In the case at bar, after Petitioner left employment, Liberty National exercised no control over her access to the job market or her ability to seek new employment. If Mott engaged in the acts alleged, they were completely beyond the control of Liberty National. Petitioner's status as a former employee in this instance should confer no greater rights under Title VII than a person with no employment relationship at all would enjoy. If Mott had done these things to a stranger, that stranger would have no basis for a claim under Title VII and Petitioner occupied the same status.

As additional support for Petitioner's argument that the Fifth Circuit has created a split of authority among the circuits, she cites *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3rd Cir. 1994). *Charlton*, like *Robinson v. Shell Oil Co.*, 117 U.S. 843, 136 L.Ed.2d 808 (1997) discussed below, involved a claim for retaliation due to alleged events that occurred after the employment relationship had ended. Accordingly, *Charlton* is distinguishable from the case at bar and its applicability is

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[2]*Alexander* specifically overruled the portion of *Doe* holding that a physician/independent contractor can maintain a Title VII claim. The court in *Alexander* cited *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377 (7th Cir. 1991) and *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996), in support of their conclusion that an independent contractor is precluded from bringing a Title VII action. *Alexander*, 101 F.3d at 494. After *Alexander*, there may or may not be a split in authority as to whether a physician/independent contractor can maintain a Title VII action. However, the present case does not present the same issues and thus is not the appropriate case for review of those issues.

limited.

3. The Supreme Court's analysis in *Robinson v. Shell Oil Co.*, 117 U.S. 843, 136 L.Ed.2d 808 (1997), concerns a claim for retaliation under § 704 of Title VII and thus is not applicable to the "hostile work environment" claim asserted by the Williamsons.

As argued by the Petitioner, this Court, in *Robinson v. Shell Oil Co.*, 117 U.S. 843, 136 L.Ed.2d 808 (1997) stated that § 704 of Title VII applies to former employees. This Court, however, also stated that other portions of Title VII are applicable only to current employees. Therefore, it is not helpful or accurate to state generally, as Petitioner has, that the Court has determined that Title VII applies to former employees and that all post-employment actions violating Title VII are cognizable. It is more helpful to focus on the specific violation of Title VII alleged by the Williamsons in this case, namely, hostile work environment sexual harassment.

In *Robinson*, the Court focused on the context of the retaliation provision to make its finding that former employees can state a claim for retaliation. The same type of contextual analysis applied to the "hostile work environment" claim leads to a different result. In Petitioner's EEOC Charge, Complaint and Amended Complaint (except for one allegation of *quid pro quo* harassment occurring on the day of Petitioner's termination) they allege "hostile work environment" sexual harassment as the basis for their Title VII claim and as the basis for their continuing violation argument raised in response to Appellees' Motion to Dismiss or, Alternatively, Motion for Summary Judgment. The relevant inquiry then, is not whether sex discrimination in general can be applied to former employees, but whether the specific form of sex discrimination alleged

applies to those who are not employees. An examination of the EEOC's guidelines and Supreme Court precedent leads to the unambiguous conclusion that "hostile work environment" sexual harassment can only be experienced by current employees.

The hostile work environment cause of action was recognized by this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), wherein it favorably cited the EEOC's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a), and defined hostile work environment sexual harassment as "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 106 S. Ct. at 2404-05 (emphasis added). To be unlawful, harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370 (1993), quoting *Meritor Savings Bank, F.S.B.*, 106 S.Ct. at 2405. This definition as adopted by this Court presumes a current employment relationship. In order for an individual to be subjected to a particular "working environment", the individual must be a part of that environment. If the individual is not an employee, the individual cannot be said to be subject to the working environment, no matter how hostile or abusive it may be. Accordingly, the definition of "hostile work environment" sexual harassment advanced by the EEOC and adopted by this Court can only apply to current employees.

This conclusion is supported by this Court's interpretation of the term "employee" as used in § 703(h) of Title VII which deals with discrimination in the areas of salary and promotion. In *Robinson*, this Court found that "employee" as used in that provision unambiguously refers to current

employees because salary and promotion disparity can only be experienced by those who are current employees. *Robinson*, 117 U.S. at ____. Likewise, the particular working environment that exists at a job site can only be experienced by current employees.

If Petitioner's argument in this regard were to prevail, there would be no limit to the applicability of Title VII. Taking Petitioner's argument to its logical conclusion would vest in a "former employee" a latent continuing violation claim for hostile work environment sexual harassment if the employer ever committed a post-employment act of discrimination against the former employee no matter how remote in time that act might be in relation to the otherwise time-barred acts of discrimination. This interpretation of the hostile work environment cause of action is overly broad, not intended by Congress, nor included within the recognized and established parameters of prior case law.

CONCLUSION

As stated on page 22 of the Petition for Writ of Certiorari, this is simply an attempt to use the Supreme Court to save Petitioner from her failure to file a timely charge. This is not, however, a case where the Petitioner or her attorney merely failed to realize the significance of Mott's alleged post-employment acts. This is a case of scrambling to save a time-barred claim. After Liberty National and Mott filed their Motion to Dismiss or, Alternatively, Motion for Summary Judgment, Petitioner had to find some way to create a viable claim. The post-employment denial of reimbursement for the LUTC exam fee (a consequence of Petitioner's termination and not a discriminatory act in and of itself), which was never raised in her charge or in any complaint, is what she and her attorney

decided to use in an attempt to create a continuing violation claim.

In light of the fact that this is simply an attempt this case does not present a proper case or controversy for review. Petitioner failed to file a facially timely charge with the EEOC alleging any post-employment act of sexual harassment, failed to file a complaint with the district court alleging any such acts and failed to identify the act during discovery as the basis for her claim. Moreover, the post-employment act of which she now complains does not constitute sex discrimination as Petitioner has failed to allege that she was treated differently than any other former employee with respect to reimbursement of the LUTC expense. Finally, Petitioner's focus on the general provisions of §703(a) is overly broad in light of the fact that she made a claim only for hostile work environment sexual harassment which is limited in its application to current employees. Accordingly, the petition should be denied

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September 12, 1997

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I hereby certify that I am this day serving the foregoing document (3) copies upon the person(s) and in the manner indicated below. Service by first-class mail addressed as follows:

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